LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U. S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

No. 71-996

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN McCLURE SNOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
GRANT W. WIPRUD,
ANN E. BELANGER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Grosso v. *United States*, 390 U.S. 62	7, 9
Haynes v. *United States*, 390 U.S. 85	7, 8
Marchetti v. *United States*, 390 U.S. 39	7, 9
United States v. *Freed*, 401 U.S. 601	7, 9
United States v. *Miller*, 307 U.S. 174	6
United States v. *U.S. Coin & Currency*, 401 U.S. 715	7, 9, 10

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Section 5811	5, 6, 7, 8
Section 5811(a)	2, 3
Section 5812(a)	2, 3, 6
Section 5821	5, 7, 8
Section 5821(a)	2, 3
Section 5821(b)	2, 3, 6
Section 5841	7, 8
Section 5851	7
Section 5853	7
National Firearms Act of June 26, 1934, c. 737, 48 Stat. 1236	5, 9, 10

459-302 O-72—1

Miscellaneous:

	Page
H. Rep. No. 1780, 73d Cong., 2d Sess.	5
H. Rep. No. 1337, 83d Cong., 2d Sess.	6
S. Rep. No. 1622, 83d Cong., 2d Sess.	6
Treasury Regulations on Machine Guns and Certain Other Firearms (1954 Code), 26 C.F.R. 179.104 (Jan. 1, 1968 rev.)	6

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-996

JOHN McCLURE SNOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW.

The district court granted petitioner's motion for a directed verdict without filing an opinion. The opinion of the court of appeals (Pet. App. A 10–18) is reported at 451 F. 2d 329.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1971 (Pet. App. B 19). A petition for rehearing was denied on December 1, 1971 (Pet. App. D 23). The petition for a writ of certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was a "peace officer" within the meaning of Sections 5812(a)(2) and 5821(b)(3)(B) of the Internal Revenue Code of 1954 (prior to their amendment by the Gun Control Act of 1968), and therefore was exempt from the excise taxes imposed by Sections 5811(a) and 5821(a) on the transfer and making of certain firearms.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in Appendix C to the petition (Pet. App. C 20–22).

STATEMENT

Petitioner was the president and a part owner of a telephone company in Foley, Alabama. Over the years he accumulated a personal collection of automatic weapons which, in 1962, included five submachine guns and three automatic rifles. He rehabilitated weapons which were non-operational when he acquired them, and converted nonautomatic weapons to automatic operation. Having organized employees of his telephone company into a quasi-militia or drill team, he equipped them with his automatic weapons and conducted public drilling and shooting programs, sometimes in conjunction with parades and other ceremonies. (Pet. App. A 11, 15–16.)

In 1964, in a libel proceeding stemming from petitioner's failure to register his automatic firearms as required by provisions of the Internal Revenue Code, petitioner's weapons were forfeited to the United

States under an order of condemnation. Thereafter, the Commissioner asserted tax deficiencies against petitioner under Sections 5811(a) and 5821(a) of the Code, which impose excises on the making and transfer of automatic weapons. Petitioner paid the taxes in dispute and brought this suit for refund, claiming that he was exempt from the taxes as a "peace officer" within the meaning of Sections 5812(a)(2) and 5821(b)(3)(B). The basis of petitioner's claim is that in 1962 and prior years, he carried a "special" or "auxiliary" deputy sheriff card issued by the Sheriff of Baldwin County, Alabama. (Pet. App. A 11–13.)

Petitioner was one of more than 400 "auxiliary" deputy sheriffs in the Foley area in 1962. His voluntary assistance to the full-time constabulary included such services as furnishing his company's vehicles for removing fallen trees from public roads; keeping criminal suspects under surveillance, distributing ballot boxes on election day, directing traffic around accidents, evacuating people during a hurricane and assisting with ticket sales at the county fair. These activities did not require or call for the use of submachine guns and automatic rifles, and petitioner's automatic weapons were not used in the pursuit of any law enforcement activities, or even in any official functions of the Sheriff's Department. (Pet. App. A 15–17.)

At the close of the evidence in the jury trial below, the district court granted petitioner's motion for a directed verdict. The court of appeals reversed and remanded with directions to enter a verdict for the

government, holding (Pet. App. A 10–11) that "the voluntary participation of a private individual in an honorary deputy sheriffs club does not automatically exempt that person from Federal excise taxes in the arming of a private quasi-militia with automatic rifles and submachine guns which are never used in the performance of police functions." The court took the view that petitioner did have the status of a "peace officer" under Alabama law, and, by reason thereof, had the same status under Federal law—including the statutory provisions which, on their face, exempt a "peace officer" from the taxes involved. But the court held on the basis of the legislative history that Congress intended to exempt a "peace officer" from the taxes only when his possession of the weapons involved was sensibly related to law enforcement activities. On the facts of this case, the court ruled (Pet. App. A 15) that petitioner's possession of automatic weapons "in no way furthered the purpose of the exemption—to aid law enforcement efforts legitimately requiring automatic weapons for safety or effectiveness."

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review. Moreover, in the Gun Control Act of 1968, Congress eliminated the excise tax exemption previously accorded to "peace officers," and also substantially revised the statutory provisions relating to the making and transfer of gangster-type weapons.

I. The taxing provisions of Sections 5811 and 5821 of the 1954 Code are part of an interrelated statutory scheme for controlling dangerous weapons which originated in the National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236. Section 3(a) of the 1934 Act imposed a heavy tax on transfers of machine guns (defined in Section 1(b) as including all automatic weapons) and sawed-off shotguns. Other sections required registration of such weapons. Under Section 13, however, the requirements of the Act were inapplicable if the weapons were transferred to a federal or state agency or officer, including a "peace officer." The purposes of the Act were reflected in H. Rep. No. 1780, 73d Cong., 2d Sess., p. 1, as follows:

> The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.

In short, Congress intended to keep machine guns and sawed-off shotguns from the hands of criminals and even innocent private citizens, but to permit such weapons to be acquired by law enforcement officers who, alone, would have a legitimate and reasonable use for them. This Court has held that the sanctions

thus employed were not unconstitutional as a usurpation of the police powers reserved to the states. *United States* v. *Miller*, 307 U.S. 174.

The taxing provisions and exemptions of the National Firearms Act, later enlarged to include a tax on the making as well as on the transfer of weapons, were reflected in Sections 2720, *et seq.* of the Internal Revenue Code of 1939, and then carried over in Chapter 53 of the 1954 Code. The legislative history of the 1954 Code refers to the tax imposed on transfer by Section 5811 as a tax on "gangster-type" weapons, as opposed to "sporting-type" firearms. H. Rep. No. 1337, 83d Cong., 2d Sess., p. A393; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 559. The exemption of "peace officers," together with other governmental authorities, was continued under Sections 5812(a)(2) and 5821(b)(3)(B). Treasury Regulations on Machine Guns and Certain Other Firearms (1954 Code), 26 C.F.R. 179.104 (Jan. 1, 1968 rev.) defines "peace officers" as: "Sheriffs, chiefs of police, commissioners of police, superintendents or other chief officers of State police units, State highway patrols, directors of public safety, and bona fide subordinate officers under the command of the aforementioned persons * * *."

As the court of appeals held, the foregoing history of the relevant taxing provisions demonstrates that Congress meant to exempt from tax only those "peace officers" who had a legitimate need and use for machine guns and sawed-off shotguns in the enforcement of the laws. The same result is reached if, as the government contended below, the term "peace officer"

is construed as applying only to police officers and the like who are, in fact, charged with law enforcement. Under either interpretation, petitioner would not qualify for the exemption since his making, acquisition and use of automatic weapons had nothing to do with his voluntary services as a "special" or "auxiliary" deputy sheriff.

The Fifth Circuit's reading of the exemption provisions, in any event, has no current administrative importance. In 1968 Congress amended the statute to limit the exemption from firearms taxes only to "official police organization[s] * * * engaged in criminal investigations." Section 5853 of the 1954 Code, as amended by Section 201, National Firearms Act Amendment of 1968, P.L. 90-618, 82 Stat. 1213, 1233. We know of no other pending cases involving the so-called "peace officer" exemption under the prior law.

2. Petitioner contends (Pet. 6–8) that the making and transfer tax provisions of Section 5811 and 5821 are unconstitutional, citing *Haynes* v. *United States*, 390 U.S. 85; *United States* v. *Freed*, 401 U.S. 601; *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715. These cases are distinguishable.

Only *Haynes* and *Freed* arose under the National Firearms Act. *Haynes* involved a prosecution under the provision of the pre-1968 version of Section 5851 making it unlawful to possess weapons that have not been registered as required by Section 5841. The Court there held (390 U.S. at 100) that "a proper claim

of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851." This holding was based on the Court's finding that Section 5841 required registration of weapons only where the possessor had not met such prior statutory requirements as payment of the taxes due on the transfer and making of firearms. Therefore, registration under Section 5841 was necessarily and automatically a self-incriminating act on the part of the registrant. As the Court explained (390 U.S. at 96), "[t]he registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons inherently suspect of criminal activities." *Albertson* v. *SACB*, 382 U.S. 70, 79."

In the case at bar, petitioner has paid the taxes assessed by the Commissioner under Sections 5811 and 5821 on the transfer and making of weapons. He is in compliance with those provisions. And such compliance does not involve, as it did in *Haynes*, self-incrimination under other statutory provisions. Petitioner is not threatened with criminal prosecution by reason of the fact that he has paid his taxes. For this reason, *Haynes* is inapposite.

Furthermore, following the *Haynes* decision, Congress substantially revised the registration requirements of Section 5841 and allied provisions so that

only a possessor of firearms who lawfully makes, manufactures, or imports firearms can and must register them. Under the new provisions, a transferee does not and cannot register, though possession of an unregistered firearm is illegal. In *Freed* this Court rejected the claim that the revised registration requirements compelled self-incrimination in violation of the Fifth Amendment prohibition. The problem presented here thus is unlikely to arise in any other case.

Marchetti and *Grosso* likewise are not in point. They involved the federal wagering tax statutes, which require gamblers to register and pay occupational and excise taxes. Compliance with the statutory requirements did not exempt taxpayers from prosecution under federal and state laws which broadly proscribe wagering, and lists of those complying with the wagering statutes were furnished to prosecutors. Under these circumstances, this Court held that seasonable invocation of Fifth Amendment rights barred prosecution for violation of the wagering statutes. The situation in the instant case is significantly different; if the requirements of the National Firearms Act are met, possession of the weapons involved is not subject to criminal sanctions under any other law.

U.S. Coin & Currency is an extension of *Marchetti* and *Grosso*. The Court held in that case that the Fifth Amendment privilege against self-incrimination may be invoked to bar an action for the forfeiture of money in the possession of a gambler, based on the gambler's failure to register and pay the wagering tax, since

the forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *U.S. Coin & Currency, supra,* 401 U.S. at 721–722. The instant case is not a forfeiture proceeding and, as noted above, possession of automatic weapons is not criminal if the requirements of the National Firearms Act are satisfied.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
GRANT W. WIPRUD,
ANN E. BELANGER,
Attorneys.

MARCH 1972.

[1] Although petitioner's weapons were condemned in a 1964 forfeiture proceeding, this was for failure to comply with the requirements of the National Firearms Act—chiefly, registration requirements—and not because petitioner was engaged in activities that were otherwise unlawful. At all events, the forfeiture of petitioner's weapons is not before this Court. The only question is whether petitioner is liable for the excises imposed on the transfer and making of automatic weapons.

U.S. GOVERNMENT PRINTING OFFICE: 1972